

**Letter of Findings: 06-0454  
Sales and Use Tax  
For the Years 2003, 2004, 2005**

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**ISSUE**

**I. Use Tax – Imposition**

**Authority:** IC § 6-8.1-5-1; IC § 6-2.5-3-2; [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-26](#); *Gross Income Tax Division v. National Bank and Trust Co.*, 79 N.E. 2d 651 (Ind. 1948)

Taxpayer protests the imposition of use tax on several items which it claims it had already paid or were duplicate items.

**STATEMENT OF FACTS**

Taxpayer is an Indiana contractor that oversees the construction of buildings for their customers. Taxpayer is owned by an exempt Indiana company. The majority of taxpayer's work is sub-contracted to other contractors. An income tax audit was completed for the years 2003, 2004, and 2005. The Indiana Department of Revenue assessed additional use tax, interest, and penalty for each of those years. The Taxpayer protested the 2004 assessment. During Protest Review taxpayer and reviewer came to agree on most of the implicated items, except for one (1) outstanding issue. A hearing was held. This Letter of Findings results. Additional facts will be supplied as required.

**I. Use Tax - Imposition**

**DISCUSSION**

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b). Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana when it was purchased in a retail transaction and no sales tax was paid at the time of purchase. IC § 6-2.5-3-2(a).

There are number of statutory exemptions from the use tax based on how a particular item was used. All exemptions must be strictly construed against the party claiming the exemption. *Gross Income Tax Division v. National Bank and Trust Co.*, 79 N.E.2d 651, 654, 226 Ind. 293, 298 (Ind. 1948).

During the audit, purchase invoices were reviewed to determine whether or not sales tax was paid on the items that were used by the taxpayer in running the business.

The Department assessed use tax on office supplies originally purchased by the exempt parent company, but then invoiced to the taxpayer, which is not an exempt company. The office supplies were audited as per [45 IAC 2.2-3-4](#):

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Taxpayer also rented equipment used in the construction of the buildings on which no sales tax was paid.

It was further determined that some construction materials (on taxable jobs) were purchased and used in a lump sum contract and no sales tax was paid at the point of sale. As these jobs were not exempt from sales tax, any sales tax due is the responsibility of the contractor. All of the aforementioned contract issues are taxable transactions as per [45 IAC 2.2-4-26\(a\)](#):

A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.

Taxpayer agreed with the assessments for 2003 and 2005, but protested four (4) items listed in the 2004 assessment under [45 IAC 2.2-4-26](#). The protest is enumerated as follows:

(1) Taxpayer protested that item dated 1/20/2004 with reference number 2718 in the amount of \$1,846.00 was listed twice. In written communication dated November 30, 2006, Protest Review agreed this was the case. Therefore, the second listing of this amount should be removed from the assessment.

(2) Taxpayer protested that it had paid all taxes on item dated 1/27/2004 with reference number 2823 in the amount of \$3,273.26. Per same November 30, 2006, written communication, Protest Review agreed that tax had been paid on all but \$102. Taxpayer agreed in an email communication dated December 11, 2006. Therefore, Taxpayer owes tax on \$102, not \$3,273.26.

(3) Taxpayer protested that the item dated 3/31/2004 with reference number 2909 in the amount of \$3,239.96 should only be for \$107.80, since it had paid tax on the remainder. Per the same November 30, 2006, written communication, Protest Review substantially agreed, but adjusted the amount on which no tax had been paid

from \$107.80 to \$119.80. Taxpayer agreed in the December 11, 2006, email communication mentioned above.

The hearing was held to resolve the single remaining protested item.

(4) Taxpayer protested that item dated 2/27/2004 with reference number 2838 in the amount of \$3,354.12 and item dated 2/29/2004 with reference numbers 35/44 in the amount of \$3,254.12 are duplicates.

Taxpayer provided a copy of check # 2838 dated 2/27/2004 for \$3,354.12 the description of which listed the total for invoices numbered 1506914-002 in the amount of \$1,634.87, 1506914-003 also in the amount of \$1,634.87, and 1790903-001 in the amount of \$84.38. Taxpayer also provided copies of the three invoices for the same amounts.

Taxpayer then provided a statement dated 2/29/2004 that listed the same invoices in the same amounts.

Taxpayer argued that the 2/29/2004 audit item in the amount of \$3,254.12 reflects the statement above and is for the same transactions as those reflected in audit item dated 2/27/2004 in the amount of \$3,354.12 which is for check #2838 with the associated invoices. Taxpayer could not explain the \$100 discrepancy between the \$3,254.12 for the 2/29/2004 audit item and the \$3,354.12 for the 2/27/2004 item, other than it is a typographical error. Taxpayer agrees it owes tax on \$3,354.12 once, not twice. Taxpayer has sustained its burden of proof.

Taxpayer has sustained its burden of proof for all four (4) protested items.

#### **FINDING**

Taxpayer's protest is sustained subject to the minor adjustments as described above.

*Posted: 08/22/2007 by Legislative Services Agency*

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